

1989

# State of Utah v. Shane Hochstetter : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; Utah State Attorney General; Attorney for Respondent.

G. Fred Metos; Yengich, Rich, Xaiz & Metos; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *State of Utah v. Shane Hochstetter*, No. 890537 (Utah Court of Appeals, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/2157](https://digitalcommons.law.byu.edu/byu_ca1/2157)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT

K F U

50

IN THE UTAH COURT OF APPEALS

.A10

DOCKET NO. 890537

STATE OF UTAH,

:

Plaintiff/Respondent, : Case No. 890537-CA

v.

:

SHANE HOCHSTETLER,

:

Priority 2

Defendant/Appellant. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM CONVICTIONS OF AGGRAVATED  
ROBBERY, A FIRST DEGREE FELONY, UNDER UTAH  
CODE ANN. § 76-6-603 (Supp. 1988); AND  
FALSELY SIGNING A FINANCIAL TRANSACTION CARD  
SALES SLIP, A SECOND DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. § 76-6-506.1  
(Supp. 1989), IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE MICHAEL R.  
MURPHY, PRESIDING.

R. PAUL VAN DAM (3312)  
Attorney General  
SANDRA L. SJOGREN (4411)  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

G. FRED METOS  
YENGICH, RICH, XAIZ & METOS  
175 East 400 South, Suite 400  
Salt Lake City, Utah 84111

Attorney for Appellant

FILED

JAN 10 1990

COURT OF APPEALS

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
Plaintiff/Respondent, : Case No. 890537-CA  
v. :  
SHANE HOCHSTETLER, : Priority 2  
Defendant/Appellant. :

---

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM CONVICTIONS OF AGGRAVATED  
ROBBERY, A FIRST DEGREE FELONY, UNDER UTAH  
CODE ANN. § 76-6-603 (Supp. 1988); AND  
FALSELY SIGNING A FINANCIAL TRANSACTION CARD  
SALES SLIP, A SECOND DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. § 76-6-506.1  
(Supp. 1989), IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE MICHAEL R.  
MURPHY, PRESIDING.

R. PAUL VAN DAM (3312)  
Attorney General  
SANDRA L. SJOGREN (4411)  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

G. FRED METOS  
YENGICH, RICH, XAIZ & METOS  
175 East 400 South, Suite 400  
Salt Lake City, Utah 84111

Attorney for Appellant

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	1
CONSTITUTIONAL, PROVISIONS, STATUTES AND RULES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT	
POINT I      TRIAL COUNSEL WAS EFFECTIVE EVEN THOUGH HE AFFIRMATIVELY WAIVED AN EYEWITNESS IDENTIFICATION INSTRUCTION BECAUSE THE INSTRUCTION WAS NOT REQUIRED.....	4
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### CASES CITED

	Page
<u>Codianna v. Morris</u> , 660 P.2d 1101 (Utah 1983).....	5-6
<u>State v. Bullock</u> , ___ P.2d ___, 119 Utah Adv. Rep. 33 (1989).....	5
<u>State v. Carter</u> , 776 P.2d 886 (Utah 1989).....	5
<u>State v. Frame</u> , 723 P.2d 401 (Utah 1986).....	9
<u>State v. Gardner</u> , ___ P.2d ___, 101 Utah Adv. Rep. 3 (1989).....	5
<u>State v. Howell</u> , 649 P.2d 91 (Utah 1982).....	9
<u>State v. Long</u> , 721 P.2d 483 (Utah 1986).....	4-6, 8
<u>State v. Morehouse</u> , 748 P.2d 217 (Utah Ct. App. 1988).....	9
<u>State v. Moritzsky</u> , 771 P.2d 688 (Utah Ct. App. 1989).....	5
<u>State v. Stilling</u> , 770 P.2d 137 (Utah 1989).....	4-5, 8

### CONSTITUTIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-302 (Supp. 1988).....	2
Utah Code Ann. § 76-6-506.1 (Supp. 1989).....	2
Utah Code Ann. § 78-2-2(4)(Supp. 1989).....	1
Utah Const. art. I, § 7.....	2
U.S. Const. Amend. VI.....	1-2

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
Plaintiff/Respondent, : Case No. 890537-CA  
v. :  
SHANE HOCHSTETLER, : Priority 2  
Defendant/Appellant. :

---

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from convictions of one first degree felony and one second degree felony in the Third District Court. This Court has jurisdiction over this case pursuant to an order of the Utah Supreme Court dated September 12, 1989 transferring the case under Utah Code Ann. § 78-2-2(4)(Supp. 1989).

STATEMENT OF THE ISSUES

1. Was trial counsel effective when he waived a jury instruction concerning the reliability of eyewitness identification where there was corroborating evidence other than the in-court identification?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

**U.S. Const. Amend. VI:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

**Utah Const. art. I, § 7:**

No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

The State charged defendant with aggravated robbery, a first degree felony, under Utah Code Ann. § 76-6-302 (Supp. 1988) (this section amended 1989, the amendment does not apply to this case); and falsely signing a financial transaction card sales slip, a second degree felony, under Utah Code Ann. § 76-6-506.1 (Supp. 1989) (R. 6). A jury convicted defendant as charged on May 16, 1989 (R. 27, 28). Judge Michael R. Murphy sentenced defendant on June 19, 1989 to a term of five years to life for count one and a concurrent term of one to fifteen years for count two (R. 62, 63).

STATEMENT OF THE FACTS

At 2:00 a.m. on May 21, 1988, Ola Brattegard was walking with his girlfriend, Marie Sorieno, on First Avenue between 900 and 1000 East in Salt Lake City (T. 51-2). They had just returned from a party and were dressed in party clothes (T. 52-3). As they walked along, three young men asked "Where's the party?" (T. 53). Brattegard felt threatened and decided to turn back (T. 53). As they walked back toward Ms. Sorieno's home, the three young men, including defendant, jumped out and defendant said "Give me all your money or I'll kill you" (T. 54).

Defendant pulled out a small calibre pistol with a long black barrel (T. 55). The three took Brattegard's tuxedo jacket that Ms. Sorieno had been wearing and fled (T. 56). Inside the jacket were Brattegard's wallet, camera, car keys, watch, two Visa credit cards, a telephone calling card, and a Norwegian Army identification card (T. 56-8). The watch was a black plastic Lorus brand with a digital face (T. 57, 64). The Norwegian Army identification card stated that Brattegard was a sergeant in the Norwegian Army (T. 58).

At 10:46 a.m. on May 21, 1988, Brattegard's stolen Visa card was used to purchase a 14 karat gold bracelet at Spencer's Gifts (T. 68-71). The person using the card wrote the address 180 P Street and signed Brattegard's name on the sales slip (T. 70). Analysis of the handwriting showed that the same person who filled out the application for defendant's California driver's license also wrote the address on the sales slip (T. 109-12).

At 2:30 p.m. on May 21, 1988, defendant pawned a 14 karat yellow gold bracelet and a black Lorus watch at Main Street Pawn (T. 76-8, 133). He presented his California driver's license with photograph as identification and left his index fingerprint on the pawn card (T. 77-9, 106-07, 133, 136). He received \$20 for these items (T. 80, 144).

Sometime during the last of May, 1988, defendant told Misty Mortensen that he and some other people had robbed a Norwegian Army sergeant using a gun (T. 83-5, 88, 93). She knew defendant through other friends and believed he had access to a gun (T. 84). Misty lived at 180 P Street and defendant had been to her house (T. 82-3).



In June, 1988 defendant and two others told Heather Smith that they had robbed a Norwegian Army sergeant (T. 96). They showed her some of the things they had taken (T. 97). One of the others called her, using a stolen telephone calling card (T. 97).

#### SUMMARY OF ARGUMENT

The circumstances of this case did not require that the jury be instructed about the reliability of eyewitness identification because there was other evidence corroborating defendant's guilt. The eyewitness identification was not the lynchpin of the State's case, although it was part of the evidence upon which the State relied for conviction. Because an eyewitness identification instruction was not required, counsel was effective even though he affirmatively waived the instruction.

#### ARGUMENT

##### POINT I

TRIAL COUNSEL WAS EFFECTIVE EVEN THOUGH HE AFFIRMATIVELY WAIVED AN EYEWITNESS IDENTIFICATION INSTRUCTION BECAUSE THE INSTRUCTION WAS NOT REQUIRED.

In State v. Long, 721 P.2d 483 (Utah 1986), the Utah Supreme Court instructed that from then on, a defendant is entitled to an instruction cautioning jurors about possible flaws in eyewitness identifications where eyewitness identification is a central issue and an instruction is requested by defense counsel. Id. at 490; see also State v. Stilling, 770 P.2d 137 (Utah 1989). The Court expressed concern that defendants not be

single witness as the lynchpin of the State's case without the jury being cautioned about the possible frailties of human perception and recall. Long, 721 P.2d at 487, 488, 490. The Court's ruling was not based upon constitutional principles but upon the Court's supervisory capacity over the lower courts. Stilling, 770 P.2d at 143.

Based upon Long, the defendant in this case contends that his attorney was ineffective because he affirmatively waived the giving of a cautionary instruction. He asserts that the trial court would have been required to give the instruction had it been requested and that, therefore, counsel was ineffective by waiving the instruction. Defendant's assertion that the instruction was required is incorrect and his claim of ineffectiveness based upon the assertion should fail.

In evaluating an ineffective counsel claim, this Court must determine both that counsel rendered a deficient performance that fell below an objective standard of reasonable professional judgment and that defendant was prejudiced by the performance before it may reverse defendant's conviction. State v. Gardner, \_\_\_ P.2d \_\_\_, 101 Utah Adv. Rep. 3, 12 (1989); State v. Carter, 776 P.2d 886, 893 (Utah 1989). Defendant must overcome a strong presumption that counsel was adequate. State v. Bullock, \_\_\_ P.2d \_\_\_, 119 Utah Adv. Rep. 33, 36 (1989); State v. Moritzsky, 771 P.2d 688, 690 (Utah Ct. App. 1989). Failure to request a pertinent jury instruction could be deficient performance "where evidentiary support for the instruction was compelling." Codianna v. Morris, 660 P.2d 1101, 1113 (Utah 1983)(failure to

request instruction on lesser included offense not supported by evidence not ineffective).

In this case, counsel's performance was not deficient because eyewitness identification was not a central issue in this case and the evidentiary support for the instruction was, therefore, not compelling. Under the Long standard, the trial court was not required to give the instruction even though it might have given the instruction if counsel had requested. It is not at all clear that Judge Murphy thought an instruction was needed. Judge Murphy merely asked counsel if an instruction was needed and even indicated that he did not think that eyewitness identification was sufficiently prominent to require a cautionary instruction (T. 154).

The identification of defendant as the person who robbed Ola Brattegard occurred at trial. There was no evidence of prior identifications through lineups, showups or photo lineups offered. The record discloses that, other than the day of trial (and on the night of the robbery), Brattegard had seen defendant at the preliminary hearing (T. 139). There is no allegation of suggestiveness that would make the allegation of a need for an eyewitness cautionary instruction more compelling nor are there any other circumstances requiring it.

Unlike Long, defendant was convicted based upon other corroborating evidence. This evidence included that, later on the day of the robbery, defendant purchased a gold bracelet using the victim's stolen credit card (T. 70-71). Although the sales clerk did not identify defendant as the purchaser of the

bracelet, a handwriting expert determined that defendant wrote the address "180 P Street, Salt Lake Utah 84109" on the sales slip after comparing the writing with a sample of defendant's writing (T. 109-12). A few hours after the gold bracelet was purchased, defendant pawned a black Lorus wristwatch, like the one stolen from the victim, and a gold bracelet, like the one purchased earlier, for \$20 (T. 76-8, 80, 133, 144). Around the time of the robbery, defendant and some other individuals bragged to two young women that they had robbed a Norwegian Army sergeant (T. 83-5, 88, 93, 96). One of these young women lived at the 180 P Street address written by defendant on the credit card sales slip (T. 82). She testified that defendant had been to her home and defendant testified that he was there on the night of the robbery (T. 139-40).

At trial, defendant told inconsistent stories about the bracelet and the watch that he pawned. When asked what he pawned, defendant replied, "My gold bracelet and a watch." (T. 133) (emphasis added). Then he said:

I don't recall where I got the watch. I think I got -- I got the bracelet from Jay, and I believe the watch from Eric.

. . .

About an hour before we hocked it.

(T. 134). Then, when asked whether he had ever seen the watch or the bracelet before that day, defendant responded:

A No, I hadn't.

Q Where as -- you say you got the watch from David?

A No. I really can't remember where I got that from. I had that for a couple of days before that.

(T. 134). Later, defendant insisted that he obtained the watch on the same day he pawned it and had never seen it before. He denied having said anything different just moments earlier (T. 146). This inconsistent testimony was evidence from which the jury could infer that defendant was lying about his claimed innocence of the crimes charged.

The corroborating evidence decreased the importance of the eyewitness identification to the point that the identification was not the central issue of the case. This case is strikingly similar to those pre-Long cases in which the Utah Supreme Court found that failure to give a cautionary instruction was not an abuse of discretion. Compare State v. Stilling, 770 P.2d 137, 143-44 (Utah 1989) (case did not require cautionary instruction as it was more like cases where court had found no abuse of discretion due to other corroborating evidence than like those where court had found abuse of discretion). Because the identification of defendant by Brattegard was not the central issue, and because there was other corroborating evidence, a jury instruction was not required under Long and counsel's waiver of the instruction was not deficient performance.

Defendant urges this Court to reverse his conviction notwithstanding the corroborating evidence because he claims that the corroborating evidence was weak. These claims of weakness are based on defendant's own testimony denying involvement in the

crimes and alleging that other witnesses lied. The jury was not obligated to believe his self-serving testimony, State v. Howell, 649 P.2d 91, 97 (Utah 1982), and the existence of his claims do not convert eyewitness identification into a central issue in this case. His arguments in this regard invite the Court to shift its focus from whether eyewitness identification was central to whether the jury ought to have relied upon the corroborating evidence. This Court should decline the invitation.

Even if this Court determined that an instruction was required because the eyewitness identification was a central issue, it could determine that defendant was not prejudiced by the failure to give the instruction and affirm the conviction. To find that defendant was prejudiced by the lack of a cautionary instruction, this Court must find that there is a reasonable likelihood of a different result if the jury had been instructed. State v. Frame, 723 P.2d 401 (Utah 1986). That is, that this Court's confidence in the verdict is undermined. State v. Morehouse, 748 P.2d 217, 219 (Utah Ct. App. 1988). The corroborating evidence described above was sufficient to support defendant's conviction even if the identification was weak and there is no reasonable likelihood of a different result if the instruction had been given.

Finally, even if counsel was ineffective for failing to request the cautionary instruction, this ineffectiveness applies only to the aggravated robbery charge. The eyewitness testimony was relevant only to that charge and there was other evidence

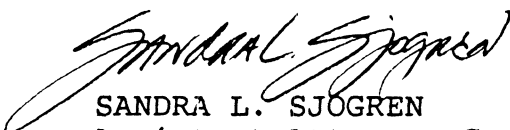
from which the jury convicted defendant of falsely signing a financial transaction card sales slip. If this Court finds reversible error, it should reverse only the conviction the error affected and affirm the conviction on count two.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's conviction of both counts. If this Court finds reversible error on the instructions relating to count one, the State requests the Court to affirm count two.

RESPECTFULLY submitted this 10 day of January, 1990.

R. PAUL VAN DAM  
Attorney General

  
SANDRA L. SJOGREN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to G. Fred Metos, Attorney for Appellant, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, this 10 day of January, 1990.

